Supreme Court, U.S.
FILED

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No. ___ ____

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IN THE
Supreme Court of the United States

October Term, 1993

LUMMI INDIAN TRIBE,

Petitioner,

v.

WHATCOM COUNTY, WASHINGTON;
BARBARA CORY, TREASURER
OF WHATCOM COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OFFICE OF THE
RESERVATION
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April 28, 1994

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QUESTIONS PRESENTED FOR REVIEW

1. Is Tribally owned fee land located on the Lummi Indian Reservation subject to State real estate taxation without an express Congressional grant of such jurisdiction?

2. Does 25 U.S.C. §177, which \restricts the alienation of any land owned by an Indian Tribe, apply to Reservation land which has been assigned to an individual Tribal member, subsequently sold to a non-Indian, and then acquired by the Tribe itself?

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LUMMI INDIAN TRIBE,

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WHATCOM COUNTY, WASHINGTON;
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REFERENCE TO THE REPORTS OF OPINIONS BELOW

Petitioner, Lummi Indian Tribe prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit reentered

April 19, 1994, which affirmed the judgment of the U.S. District Court for the Western District of Washington at Seattle. The decision of the United States Court of Appeals for the Ninth Circuit is reported as *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993). See Appendix B. The decision of the United States District Court for the Western District is not reported. See Appendix A.

STATEMENT OF JURISDICTION

The order and decision on which review is sought was entered December 23, 1993, and reentered on April 19, 1994. The order included amendments made pursuant to petitioner's request for rehearing. Jurisdiction to review the judgment is conferred on this Court by 28 U.S.C. §1254(1).

TREATIES AND STATUTES INVOLVED

This case involves the Article 7 of Treaty of Point Elliott, 12 Stat. 927 (1859) and Article 6 of the Treaty with the Omahas, 10 Stat. 1043 (1854). Both are reproduced in Appendix C to this Petition.

The following statutes are also involved: 25 U.S.C. §177; 25 U.S.C. §331; 25 U.S.C. §348; 25 U.S.C. §349; 25 U.S.C. §372. The statutes are also reproduced in Appendix C.

STATEMENT OF THE CASE

This case presents the "prior legal question" specifically left open in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. ____, 116 L.Ed.2d 687 (1992): Whether the alienability

of tribally owned reservation lands is sufficient, by itself, to subject those lands to state taxing jurisdiction absent an unmistakably clear Congressional grant of such jurisdiction.

By a two to one decision, the Court of Appeals for the Ninth Circuit held that "alienable land is taxable land" even as it acknowledged that "[t]his proposition may be hard to square with the requirement, recently approved by the *Yakima Nation* Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear." *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1357 (9th Cir. 1993).

The Petition for Certiorari should be granted to resolve the conflict between this Court's frequently articulated stringent standard for determining state taxing jurisdiction of Reservation property, *see*, e.g., *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. ____, 124 L.Ed.2d 30, 43 (1993); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), and the contrary result below which the majority opinion found to be a "virtually inescapable ... conclusion" from the "strength of the language in *Yakima Nation*." 5 F.3d at 1357. The Ninth Circuit's interpretation of *Yakima Nation* is inconsistent with the actual holdings in that case and with settled principles of Federal Indian law.

A subsidiary question is whether the restraint on alienation of Tribal lands imposed by 25 U.S.C. §177 applies to Reservation lands reacquired by a Tribe after a period of non-Indian ownership, and if so, whether that restraint on alienation precludes state taxation.

ARGUMENT

I. THE LUMMI PARCELS WERE TREATY ASSIGNMENTS, NOT GENERAL ALLOTMENT ACT ALLOTMENTS

In *Yakima Nation*, the Court held that Washington's ad valorem property tax could be imposed on Indian owned Reservation fee lands allotted under the Indian General Allotment Act of 1887 (25 U.S.C. §§331 et seq.), but that Washington's real estate excise tax could not be imposed on the sale of such lands. The distinction between the two taxes lay in the Court's finding that Congress had given clear and unmistakable consent to the taxation of the land through the enactment and amendment of the General Allotment Act, but that such consent was lacking where the excise tax was concerned. 502 U.S. ____, 116 L.Ed.2d at 705.

The *Yakima Nation* decision dealt extensively with the history and structure of the General Allotment Act. At the close of the decision, the Court specifically left open the Yakima Nation's factual contention that certain parcels at issue in the case were patented under statutes other than the General Allotment Act, as well as the "prior legal question whether it makes any difference." 502 U.S. ____, 116 L.Ed.2d at 705. This case addresses that legal question.

The factual history of the Lummi parcels is not in dispute. As the Ninth Circuit noted:

> The Lummi Indian Reservation was created in 1855 by the Treaty of Point Elliott, a compact between the United States and numerous tribes and bands of Indians in northern Puget Sound.

Under the terms of the Treaty, the Lummi ceded all rights to a significant section of Western Washington, in return for exclusive use of reservation lands. The Treaty also authorized the subdivision of the Reservation into parcels which could be assigned or allotted to individuals or families.

In 1884 the government carried out the treaty terms, dividing 10,500 acres of the Reservation into 72 assignments or allotments and issuing fee patents, subject to restrictions on alienation and exempt from levy, sale and forfeiture. The taxability of four parcels, all now owned by the Tribe in fee patent status, is at issue in this case.

The first parcel is a portion of an original assignment made to Lewis Kichowilton. After his death, Kichowilton's heirs divided his allotment among themselves, with the parcel at issue deeded to Mary George, a member of the Tribe. Upon George's death, Irene Miller, a Canadian Indian, inherited the land. Because the United States had no supervisory responsibility over Miller, the Bureau of Indian Affairs issued an "Order Removing Restrictions," allowing Miller to alienate the parcel. In the 1970s the Tribe purchased it from a non-Indian owner.

The three other parcels were originally assigned to John A. Jones. In 1916, after determining that Jones was "fully competent and capable of transacting his own business," the Secretary of the Interior issued him a "Certificate of Competency." *See*, 25 U.S.C. §372 (1988). It removed any restriction on Jones' ability to alienate the land.

> The Tribe purchased these parcels in the early 1980's.

Lummi Indian Tribe v. Whatcom County, 5 F.3d at 1356-57.

Obviously, the Indian General Allotment Act of 1887 was not involved in the allotment of these parcels, since that statute was not passed until three years *after* the assignments were made under the Treaty provisions. In addition, the title which the Treaty assignees received was a restricted fee patent, while the General Allotment Act allotees received 25 year trust patents. *See*, 25 U.S.C. §348. Likewise, §6 of the General Allotment Act (25 U.S.C. §349), which provides for the eventual patenting in fee of General Allotment Act allotments, specifically provides for the removal of "all restrictions as to .... taxation of said land." No similar language exists in 25 U.S.C. §372, the statute used to allow alienation of the Treaty assigned lands on the Lummi Reservation.

Thus, the question of taxability of the Lummi parcels is not controlled by the General Allotment Act, but rather by the treaty and statutory provisions actually used to assign and alienate the land. This is the issue left open in *Yakima Nation*.

Contrary to this Court's requirements in Indian taxation cases, the Ninth Circuit did not examine the differences between the General Allotment Act and the Treaty assignments, nor did it examine the history and structure of the statute utilized to remove the restraints on alienation. Rather, it held that this Court's decision in *Yakima Nation* decided the very question which the Court had specifically declined to rule upon.

The Ninth Circuit's ruling violates this Court's often stated and recently repeated method of analysis in Indian taxation cases.

II. RESERVATION PROPERTY IS NOT SUBJECT TO STATE TAXATION IN THE ABSENCE OF AN UNMISTAKABLY CLEAR GRANT OF TAXING JURISDICTION

The Court has frequently stated the standard for assessing state taxing jurisdiction on an Indian Reservation:

> In the special area of state taxation of Indian Tribes and Tribal members, we have adopted a *per se* rule. In *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), we held that Montana could not tax the Tribe's royalty interest in oil and gas leases issued to non-Indian lessees under the Indian Mineral Leasing Act of 1938. We stated:
>
> > In keeping with its plenary authority over Indian affairs, Congress *can* authorize the imposition of state taxes on Indian Tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians exemption from state taxes lifted only when Congress has made its intention to do so *unmistakably clear*. *Id.* at 765. We have repeatedly addressed the issue of state taxation of Tribes and Tribal members and the state, federal and Tribal interest which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the

> state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), we distinguished state taxation from other assertions of state jurisdiction.

California v. Cabazon Band of Mission Indians, 480 U.S. 202, n. 17 (1987) (emphasis added).

As recently as 1993 the Court unanimously reaffirmed these basic principles and applied them even to an "informal" reservation:

> Absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities.

Oklahoma Tax Commission v. Sac & Fox Nation, 508 U.S. ____, 124 L.Ed.2d 30, 43 (1993).

III. CONTRARY TO THE NINTH CIRCUIT HOLDING, THE YAKIMA NATION COURT APPLIED THE BASIC PRINCIPLES BUT FOUND AN EXPRESS GRANT OF JURISDICTION

Yakima Nation dealt with an express grant of taxing jurisdiction which made explicit the *implied* grant of taxing jurisdiction which the Court said arose from the free alienability of the land. 502 U.S. ____, 116 L.Ed.2d 701. The Court did not hold that an implied grant, standing alone, satisfied the jurisdictional test.

Indeed, the Court again required a finding that Congress had clearly ceded jurisdiction to the state:

> "[A]bsent cession of jurisdiction or other federal statutes permitting it," we have held, a State is without power to tax reservation lands and reservation Indians. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has "made its intention to do so unmistakably clear." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985); see also *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n.17 (1987).

Yakima Nation, 502 U.S. ____, 116 L.Ed.2d 687, 697-98.

The cession language relied upon by the Court to satisfy this test was the Burke Act, a 1906 amendment to §6 of the General Allotment Act (codified at 25 U.S.C. §349). It expressly provided for removal of "all restrictions as to sale, incumbrance or taxation of said land" upon the issuance of a fee patent under the General Allotment Act.

Two factors indicate that this direct reference to taxation was necessary to satisfy the express grant test. First, if the removal of restrictions on sale was itself sufficient to subject the land to taxation, Congress would not have found it necessary to include an express removal of "restrictions as to . . . taxation," as well as the removal of "restrictions as to sale."

Any other construction "violates the settled rule that a statute must, if possible, be construed in such fashion that every word has some appropriate effect."

United States v. Nordic Village Incorporated, 503 U.S. ____, 117 L.Ed.2d 181, 189 (1992); *Reiter v. Sonotone Corporation*, 442 U.S. 330, 338-39 (1979).

This Court recognized the general distinction between the restraint on alienation and the tax exemption in a case decided shortly after the Burke Act was passed:

> [T]he exemption and non-alienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation ... . The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma.

Choate v. Trapp, 244 U.S. 665, 673 (1912) (citations omitted).

Second, the *Yakima Nation* Court itself focused and relied upon the language of the Burke Act proviso to distinguish between the ad valorem real estate tax and the real estate excise tax. Noting that the proviso specifically referred to "taxation of said land," the Court upheld the ad valorem tax. However, the excise tax was imposed on the sale of the land, and the Court found that tax was not authorized by the statute. The Court held:

> It does not exceed the bounds of permissible construction to interpret "taxation of land" as

> including taxation of the proceeds from sale of land; and it is even true that such a construction would be fully in accord with *Goudy's* emphasis upon the consequences of alienability, which underlay the Burke Act proviso. That is surely not, however, the phrase's unambiguous meaning. ... When we are faced with these two possible constructions, our choice between them must be dictated by a principle deep rooted in this Court's Indian jurisprudence: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit". *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 766.

Yakima Nation, 502 U.S. ____, 116 L.Ed.2d 704.

If there was any doubt that the *Yakima Nation* Court was relying upon an explicit grant of taxing authority, that doubt was dispelled when the Court summarized its opinion:

> The short of the matter is that the General Allotment Act *explicitly authorizes* only "taxation of ... land," not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." Because it is imminently reasonable to interpret the broad language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe. Accordingly, Washington's excise tax on sales of land cannot be sustained.

502 U.S. ____, 116 L.Ed.2d 705 (emphasis added).

If the "emphasis on the consequences of alienability" in *Goudy v. Meath*, 203 U.S. 146 (1906) were sufficient, by itself, to subject the land to taxation, then surely that emphasis would have been sufficient to subject to taxation the freely alienable proceeds of the sale of the land. The Court would have had no occasion to consider whether the Burke Act proviso was ambiguous in relation to the real estate excise tax if the proviso were not a necessary component of the Court's answer to the prior question: Did Congress evidence an unmistakably clear intent to allow taxation of the land itself?

The Court held "[t]he Burke Act proviso, enacted in 1906, made (the) implication of §5 explicit, and its nature more clear." 502 U.S. ____, 116 L.Ed.2d 701. Without the additional clarity of the explicit removal of restrictions on taxation, the mere implication arising from the alienability of the land was an insufficient basis for taxing jurisdiction.

Numerous examples exist of freely alienable Indian property exempt from State taxation because it is located on a reservation. For example, *Bryan v. Itasca County*, 426 U.S. 373 (1976) (mobile home, personal property, located on a Reservation); *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965) (gross receipts tax on store located on Reservation); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) (income earned by Tribal member resident on a Reservation); *Central Machinery Company v. Arizona State Tax Commission*, 447 U.S. 134 (1990) (purchase of personal property exempt from state sales tax); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (Indian owned automobiles exempt from state motor vehicle excise tax); *Washington v. Confederated*

Tribes of Colville Reservation, 447 U.S. 134 (1980) (Indian purchasers exempt from State cigarette and tobacco taxes).

In none of these cases was the fact of alienability of the property considered significant or determinative by the Court. Rather the location of the property on the reservation and the status of the owner as an Indian or Indian tribe controlled the outcome.

This conclusion is consistent with *Goudy*. Although *Goudy* may have placed "emphasis" on alienability, the case did not rest on that ground alone. The underlying facts in *Goudy* clearly demonstrate the doctrinal basis for the decision. Those facts do not all appear in this Court's decision. The case was submitted on an agreed statement of facts, which is referred to in the Court's decision, 203 U.S. at 146, but set out in full in the Washington State Supreme Court decision, 38 Wash. 126, 127 (1905). The crucial fact, and the one which distinguishes *Goudy* from all other Indian taxation cases, is that although Mr. Goudy is described as an Indian, it was also stipulated that he "was formerly a member of the Puyallup Tribe" who, at the time he brought the case, had "entirely severed his Tribal relation."

Therefore, in the eyes of the law, Mr. Goudy was no longer considered to have the status of an Indian, even though he was ethnically an Indian. Consequently, one of the crucial elements necessary for the tax exemption was missing. The land still had a Reservation situs, but the owner did not have the status of an Indian because he had severed his Tribal relations. Viewed from this perspective *Goudy* stands for nothing more surprising than the fact that a person who is not a Tribal

member may not claim tax exemptions available only to Tribal members.

This also explains the *Goudy* Court's emphasis on alienability. Congress unquestionably had the power to restrict the alienability of a tribal member's property. As *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867) and *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867) make clear, the Indians' tax exemption was not based on the restricted status of the land. Rather the fact that the land was owned by an Indian and located on a reservation was determinative. The restraint on alienation provided a *second* basis for exemption since if the land could not be involuntarily sold, it could not be taxed.

Conceptually, the restraint on alienation could survive both the termination of the reservation and the severing of tribal relations. If either of these events occurred, the restraint on alienation would still provide a separate argument for exemption from state taxation.

Thus, a former tribal member could own land restricted against alienation. When the restraint on alienation was lifted, however, there would be no independent basis for the tax exemption because the owner could not claim exemptions related to Indian status.

This was precisely Mr. Goudy's situation. He had severed his tribal relations and the restraint on alienation had been removed. Instead of "presuming against a State's having the jurisdiction to tax", *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. ____, 124 L.Ed.2d 43, 113 S. Ct. 1985, 1993, as it would in an Indian taxation case, the Court placed the burden on

Goudy to demonstrate the existence of an express exemption, as it would in a typical non-Indian taxation case. 203 U.S. at 149. Cf. *McClanahan*, 411 U.S. at 176, and *Sac and Fox*, 508 U.S. ____, 124 L.Ed. 2d at 40.

Finding that "it would seem strange" for Congress to silently preserve a tax exemption while explicitly removing the restraint on alienation which was the sole remaining basis for the tax exemption, the Court concluded that Goudy's land was taxable. The Court immediately reinforced this conclusion by noting that Mr. Goudy was fully subject to all of the laws of the state, including its tax laws. 203 U.S. at 149. Thus, only the restraint on alienation stood between Mr. Goudy and the state's ability to tax his land. When that restraint was removed, Goudy's land became taxable. But the result would have been different if a tribal member owned the land and it was located on a reservation.

In conclusion, this Court's decision in *Yakima Nation* did not hold that alienable Tribal property is per se taxable by the State. The Ninth Circuit has read too much into the Court's decision and paid too little attention to the statutes involved, the lack of express grants of jurisdiction, and the long tradition of exempting Tribal property from state taxation in the absence of clear Congressional consent. The Writ of Certiorari should issue to review the decision of the Ninth Circuit and to eliminate any potential confusion caused by that Court's interpretation of the *Yakima Nation* decision.

IV. A SEPARATE RESTRAINT ON ALIENATION IS IMPOSED BY 25 U.S.C. §177

The Ninth Circuit held that Tribal fee lands acquired from non-Indians on the Reservation were not

restricted as to alienation by the provisions of 25 U.S.C. §177. This holding conflicts with decisions of the Tenth Circuit in *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957) and *Buzzard v. Oklahoma Tax Commission*, 992 F.2d 1073 (10th Cir. 1993). Certiorari should be granted to resolve this conflict.

The provisions of 25 U.S.C. §177 are clear and unambiguous. It voids any "purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian Nation or Tribe of Indians ..." unless specifically authorized by Treaty or federal statutory provisions. The statute makes no distinction as to the source of the Tribe's title. By its terms, it applies to *any* conveyance of *any* Tribal lands.

A statute clear on its face must be applied by the Courts as written. "In a statutory construction case, the beginning point must be language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Howitt v. Nicklos Drilling Company*, ____ U.S. ____ 120 L.Ed.2d 379, 388 (1992).

This Court has consistently applied §177 to all tribal lands. In *United States v. Sandoval*, 231 U.S. 28 (1913), the Court held that the source of Indian title was irrelevant to the application of §177. The lands in question were owned by an Indian Pueblo and title was traceable to Spanish or Mexican grants which preceded the inclusion of New Mexico in the United States. *Sandoval* was followed by *United States v. Candelaria*, 271 U.S. 432 (1926) in which the Court specifically applied §177 to enjoin state taxation, holding that the Tribal

lands "cannot be alienated in any wise" without Congressional consent. 271 U.S. at 443.

The lower courts have consistently followed these rulings. In *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), the Tenth Circuit held that fee lands acquired by a Pueblo through purchase in 1936 and 1939 were subject to the restrictions on alienation imposed by §177. The Tenth Circuit recently reaffirmed its holding in *Alonzo* in *Buzzard v. Oklahoma Tax Commission* where the Court applied the statute even to recently acquired fee lands located outside of a Reservation. The commentators also agree:

> Even land held by a tribe in fee simple is subject to the statutory restraints against alienation ... Another consequence of the restraints on alienation is the inability of states to transfer title by foreclosure sale ... or the nonpayment of taxes.

F. Cohen, *Handbook of Federal Indian Law* (1982 ed. p. 520) (footnotes omitted).

The Ninth Circuit decision in the present case is the only authority to the contrary. The majority opinion reasoned that "[n]o court has held that Indian land approved for alienation by the federal government and then reacquired by a tribe again becomes inalienable." 5 F.3d at 1359. This reasoning suffers from two fatal defects. First, the restraints on alienation are personal to the owner of the land. They do not contemplate a future owner. The fact that the federal government, exercising its supervisory role over the affairs of one particular Indian, removes a restraint on that individual's ability to alienate the property, does not mean that a

subsequent owner may not be restrained in *its* ability to alienate the property.

Second, in the case of a tribal owner, the restraint is imposed by the clear wording of §177, which declares that "*no* ... conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity ... ." The restraint imposed on the individual's ability to sell the land has an entirely different source, and there is nothing to indicate that allotted lands would be exempt from the provisions of §177 if they were subsequently acquired by a tribe.

Neither of the cases relied upon by the Ninth Circuit so holds. Both *South Carolina v. Catawaba Indian Tribe, Inc.*, 476 U.S. 498 (1986) and *Larkin v. Paugh*, 276 U.S. 431 (1928) dealt with the effect of termination of federal supervision over the land owner. They did not deal with subsequent acquisition of the land by a tribe subject to the provisions of §177.

The Ninth Circuit decision is clearly at odds with controlling decisions from this Court and in conflict with a consistent line of decisions from the Tenth Circuit. Certiorari should be granted to resolve this conflict.

CONCLUSION

Indian Reservation lands have always received the highest order of protection from state jurisdiction, especially taxing jurisdiction. If the Ninth Circuit's decision in this case is allowed to stand, Indian land will receive less protection than any other Indian property. The decision is based on a vague implication said to arise from the free alienability of the land, even though this Court has consistently required an unmistakably

clear Congressional grant of jurisdiction to the States before allowing them to tax Indian reservation property. When the controlling precedents are properly understood in their factual contexts, it is obvious that the decision is fundamentally in error. In addition, the Ninth Circuit incorrectly held that 25 U.S.C. §177 does not apply to tribal fee lands. This decision is in direct conflict with the Tenth Circuit and with this Court's decisions. The Writ of Certiorari should issue to correct these errors.

Respectfully submitted this 28th day of April, 1994.

OFFICE OF THE RESERVATION ATTORNEY

Harry L. Johnsen III
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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUMMI INDIAN TRIBE, Plaintiff, v. WHATCOM COUNTY, et al., Defendants.	Case No. C89-696W **ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS**

The parties have filed cross-motions for summary judgment. There are no genuine issues as to material facts. For the reasons set forth below, defendants' motion is GRANTED; and plaintiff's motion is DENIED.

Defendants' motion for order of joinder of the State of Washington as defendant or in the alternative for dismissal is DENIED.

The basic issue is whether land within the Lummi Reservation and held in fee patent by the Lummi Tribe is subject to taxation by the State of Washington.

Since this case was filed, the U.S. Court of Appeals for the Ninth Circuit has decided a similar case which is dispositive of this issue: *Confederated Tribes and Bands of the Yakima Nation v. Yakima County*, et al, 893 F. 2d 1044 (9th Cir. 1990). In *Yakima*, the lands in question were all within the Yakima Reservation. Most were owned by individual members of the tribe; but some of the land was owned by the tribe itself. The court treated both categories of land identically, holding both subject to state real estate taxes. Such land is exempt from state taxation, the court held, unless Congress makes unmistakably clear its intention that the exemption be lifted. But the court held that Congress did so in the General Allotment Act, 25 U.S.C. §349. That section specifically provides that, once a patent in fee simple has been issued to an Indian, all restrictions as to taxation of said land shall be removed.

In attempting to distinguish *Yakima*, plaintiff argues that the provisions of §349 apply only to land for which the fee patent was issued pursuant to the procedures of the General Allotment Act. The Lummi Tribe, however, obtained fee patent to some or all of the land involved in this case by virtue of treaty, and not the General Allotment Act. The General Allotment Act provides for allotment of lands to individual tribal members, not to the tribes themselves.

This attempt to distinguish *Yakima* is not persuasive, because the ruling in that case was not limited to land obtained pursuant to the General Allotment Act. The District Court had prohibited Yakima County from taxing *both* the fee patent land of the Yakima Nation *and* that of its members ("Order" of Judge McDonald, 5/10/88, at p. 7). On appeal, the Ninth Circuit noted that there was land in each category,

but reversed in all respects. Although the land held by the Yakima Nation had not been obtained under the General Allotment Act, the court nevertheless held it was subject to state taxation. Thus, the fact that the land was held in fee patent status seemed to be determinative, without regard to whether it was issued pursuant to the General Allotment Act or otherwise.

Goudy v. Meath, 203 U.S. 146, 27 S. Ct. 48, 51 L. Ed. 130 (1906) lends further support to this conclusion. In *Goudy*, the Supreme Court held that fee patent land held by a Puyallup Indian was subject to taxation by the State of Washington. The case is significant here because the plaintiff in *Goudy* had obtained his fee patent pursuant to treaty, not pursuant to the General Allotment Act. Plaintiff here suggest that *Goudy* is no longer good law, and is distinguishable in a number of other respects. *Goudy* has never been overruled, however; and was cited and discussed just months ago by the Ninth Circuit in *Yakima*.

In light of this disposition, it is not necessary to address defendants' further argument that plaintiff is barred by the statute of limitations or by laches from challenging the taxability of its lands.

Defendants' motion to add the State of Washington as a party defendant is likewise moot, in light of this ruling. So long as Whatcom County is entitled to levy and collect taxes against this land, the county is not subject to any conflicting obligation to the State of Washington. Defendants' motion for joinder is therefore denied.

The Clerk is directed to enter judgment for defendants and against plaintiff, and to provide copies of

this order and of the judgment to counsel for both parties.

DATED this 27 day of April, 1990.

JOHN L. WEINBERG
United States Magistrate

APPENDIX B
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

LUMMI INDIAN TRIBE, Plaintiff-Appellant, v. WHATCOM COUNTY, WASHINGTON; BARBARA CORY, TREASURER OF WHATCOM COUNTY, Defendants-Appellees.	No. 91-35622 **ORDER AND AMENDED OPINION**

Argued and Submitted
August 20, 1992
Submission Withdrawn May 3, 1993
Resubmitted September 24, 1993
Decided October 1, 1993
As Amended on Denial of Rehearing
and Suggestion for Rehearing En Banc
December 23, 1993
Order Granting Motion
to Reenter Judgment
April 19, 1994
Before: WRIGHT, BEEZER, and LEAVY,
Circuit Judges.

COUNSEL

Harry L. Johnsen, Office of the Reservation Attorney, Lummi Indian Tribe, Bellingham, Washington, for plaintiff-appellant.

Robert A. Carmichael, Special Deputy Prosecuting Attorney, Bellingham, Washington, for defendants-appellees.

OPINION

EUGENE A. WRIGHT, Circuit Judge:

The Lummi Indian Tribe appeals from summary judgment denying it declaratory and injunctive relief from the assessment and collection of Washington's ad valorem property tax. The Tribe contends that its fee-patented reservation land is exempt from taxation because it was allotted to the Tribe under the Treaty of Point Elliott rather than the General Allotment Act, which permits such taxation. We disagree that reservation land should be treated differently because it was patented under a treaty. We affirm.

I

The Lummi Indian Reservation was created in 1855 by the Treaty of Point Elliott, a compact between the United States and numerous tribes and bands of Indians in northern Puget Sound. Under the terms of the Treaty, the Lummi ceded all rights to a significant section of Western Washington, in return for exclusive

use of reservation lands. The Treaty also authorized the subdivision of the Reservation into parcels, which could be assigned or allotted to individuals or families.

In 1884, the government carried out the treaty terms, dividing 10,500 acres of the Reservation into 72 assignments or allotments and issuing fee patents, subject to restrictions on alienation and exempt from levy, sale and forfeiture. The taxability of four parcels, all now owned by the Tribe in fee patent status, is at issue in this case.

The first parcel is a portion of an original assignment made to Lewis Kichowilton. After his death, Kichowilton's heirs divided his allotment among themselves, with the parcel at issue deeded to Mary George, a member of the Tribe. Upon George's death, Irene Miller, a Canadian Indian, inherited the land. Because the United States had no supervisory responsibility over Miller, the Bureau of Indian Affairs issued an "Order Removing Restrictions," allowing Miller to alienate the parcel. In the 1970s, the Tribe purchased it from a non-Indian owner.

The other three parcels were originally assigned to John A. Jones. In 1916, after determining that Jones was "fully competent and capable of transacting his own business," the Secretary of the Interior issued him a "Certificate of Competency." *See* 25 U.S.C. §372 (1988). It removed any restrictions on Jones' ability to alienate the land. The Tribe purchased these parcels in the early 1980s.

Under state law, Whatcom County has levied and collected ad valorem property tax payments on these reservation fee lands. In May 1989, the Tribe filed suit,

claiming that the tax violated federal law. It sought declaratory and injunctive relief; a refund of taxes, interest and penalties collected; and damages for civil rights violations under 42 U.S.C. §1983. The parties filed cross motions for summary judgment. A magistrate judge entered summary judgment against the Tribe, finding that the case was controlled by our decision in *Confederated Tribes and Bands of the Yakima Nation v. County of Yakima*, 893 F.2d 1044, modified, 903 F.2d 1207 (9th Cir.1990), aff'd, --- U.S. ----, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992). The Tribe timely appealed. We have jurisdiction under 28 U.S.C. §1291.

II

In *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, --- U.S. ----, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992), the Court held that the General Allotment Act of 1887[1] permitted Yakima County to impose an ad valorem tax on reservation land patented in fee under the Act and owned by reservation Indians or the Nation itself. The Court expressly refused to decide whether parcels patented under an act other than the General Allotment Act are also taxable. See *Yakima Nation*, --- U.S. at ----, 112 S.Ct. at 694. The Lummi contend that because their fee patents were issued under the Treaty of Point Elliott, rather than the

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[1]The Act authorized the government to issue 25-year trust patents to Indians. These patents contained restrictions against alienation that expired once the trust period ended. Under the proviso to Section 6 of the Act, the Secretary of the Interior could remove the restrictions earlier if he found an Indian competent to manage his or her own affairs.

General Allotment Act, Whatcom County may not tax the parcels.

We must decide one of the questions left open by *Yakima Nation*: whether reservation land should be treated differently because it was patented under a treaty. Because the Court in *Yakima Nation* focused on the Yakima's ability to alienate their land, rather than on how it was allotted, we conclude that if the Lummi land is alienable, it is taxable.

A. Alienability as a Basis for Taxation

A state cannot tax reservation lands or reservation Indians unless Congress has " 'made its intention to [authorize state taxation] unmistakably clear.' " *Id.* at ---, 112 S.Ct. at 688 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765, 105 S.Ct. 2399, 2402, 85 L.Ed.2d 753 (1985)). In *Yakima Nation*, the Court found an unmistakably clear intent to tax fee-patented land. It did not rely on section 6 of the General Allotment Act as Yakima County proposed,[2] concluding instead that the

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[2]Section 6 provides:

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, ... then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside ... Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and

land's alienable status determines its taxability. *See Id.* at --- U.S. ----, 112 S.Ct. at 688-691. The Court made no distinction between fee land allotted by treaty and that allotted under the Act. Its interpretation of section 5 of the Act and the proviso to section 6 imply that no matter how the land became patented, it is taxable once restraints against alienation expire.

The Court found further support for this conclusion in its decision in *Goudy v. Meath*, 203 U.S. 146, 27 S.Ct. 48, 51 L.Ed. 130 (1906). In *Goudy*, a Puyallup Indian claimed exemption from real property taxation under the Treaty of December 26, 1854, which, like the Treaty of Point Elliott, was patterned after the Treaty with the Omahas. 203 U.S. at 146, 27 S.Ct. at 48. The Treaty of the Omahas allowed the President to issue a restricted patent on allotted lands. *Id.* at 147, 27 S.Ct. at 50. The restrictions on alienation would remain until the state legislature, with Congressional consent, removed them. *Id.* The Court decided that once the land allotted under the treaty became alienable, it also became taxable. *See Id.* at 150, 27 S.Ct. at 50. In so deciding, the Court relied in part on the General Allotment Act provisions that made an Indian subject to the state laws once restrictions on the land were removed. *See Id.* at 149, 27 S.Ct. at 50.

The *Yakima Nation* Court approved Goudy's holding, citing *Goudy* for the proposition that alienable land is taxable unless explicitly exempted:

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thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed...." 25 U.S.C. §349.

> although it was certainly possible for Congress to "grant the power of voluntary sale, while withholding the land from taxation or forced alienation," such an intent would not be presumed unless it was "clearly manifested." For "it would seem strange to withdraw [the] protection [of the restriction on alienation] and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it [*sic*] from taxation."

Yakima Nation, --- U.S. at ----, 112 S.Ct. at 691 (alteration in original) (citation omitted). The logic propounded by the Goudy Court and approved by *Yakima Nation* requires an Indian, even though he receives his property by treaty, to accept the burdens as well as the benefits of land ownership. This proposition may be hard to square with the requirement, recently approved by the *Yakima Nation* Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear. The strength of the language in *Yakima Nation*, however, makes virtually inescapable the conclusion that the Lummi land is taxable if it is alienable.

B. Alienability of the Four Parcels

Though the four parcels were at one time alienable, the Tribe argues that the Indian Nonintercourse Act, 25 U.S.C. §177, renders the land inalienable upon reacquisition by the Tribe. We disagree.

The Act provides, in pertinent part,

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from

> any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. §177. The Act has not changed materially since its passage, in 1790, at the insistence of President Washington and Secretary of War Henry Knox. *See* Susan C. Antos, Comment, Indian Land Claims Under the Nonintercourse Act, 44 Alb.L.Rev. 110, 111, 120 (1979). President Washington and Secretary Knox thought that only the federal government could ensure Indian lands were settled peacefully and Indians treated fairly. *Id.* at 111. Courts considering the Act's purpose have agreed that Congress intended to protect Indians from the "greed of other races," *United States v. Candelaria*, 271 U.S. 432, 442, 46 S.Ct. 561, 563, 70 L.Ed. 1023 (1926), and from "being victimized by artful scoundrels inclined to make a sharp bargain," *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885, 888 (2d Cir.), cert. denied, 358 U.S. 841, 79 S.Ct. 66, 3 L.Ed.2d 76 (1958), vacated as moot sub nom., *McMorran v. Tuscarora Nation of Indians*, 362 U.S. 608, 80 S.Ct. 960, 4 L.Ed.2d 1009 (1960).

The Tribe relies on two lines of cases, arguing that any lands held by a tribe, even those held in fee, are inalienable under the Act. First, courts have held that the Act applies to tribal lands regardless of how it was acquired. *Tuscarora Nation* 257 F.2d at 887-91 (acquisition by purchase); *United States v. 7405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir.1938) (same). The purchases in those cases were made for or by a tribe during the 1800s and, in *7405.3 Acres*, had since been conveyed to the United States in trust for the tribe. In contrast, the Lummi parcels are held in fee by the Tribe,

which purchased them during the 1970s and 1980s, after the United States approved their alienation.

The second line of cases on which the Tribe relies involves Pueblo lands. See *Candelaria*, 271 U.S. 432, 46 S.Ct. 561, 70 L.Ed. 1023; *Alonzo v. United States*, 249 F.2d 189 (10th Cir.1957), cert. denied, 355 U.S. 940, 78 S.Ct. 429, 2 L.Ed.2d 421 (1958). The courts in those cases held that Pueblo fee land was inalienable. Congress has acted repeatedly to ensure that Pueblo lands remain subject to restrictions against alienation. See *United States v. University of New Mexico*, 731 F.2d 703, 706 (10th Cir.), cert. denied, 469 U.S. 853, 105 S.Ct. 177, 83 L.Ed.2d 111 (1984); *Alonzo*, 249 F.2d at 193-95. By contrast, the federal government has made no move to protect this Lummi land.

The Tribe asks us to extend the reasoning in the preceding lines of cases to land for which the government previously had removed the restraints on alienation. We decline to do so.

The federal government has provided a means whereby Indians may convey land in trust to the government and thus remove the land from state tax rolls. *See* 25 U.S.C. §465 (1988). In fact, one of the factors that the BIA must consider in deciding whether to accept new trust land is the effect on a state of removing the land from its tax rolls. See 25 C.F.R. §151.10(e) (1992).

No court has held that Indian land approved for alienation by the federal government and then reacquired by a tribe again becomes inalienable. To the contrary, courts have said that once Congress removes restraints on alienation of land, the protections of the

Nonintercourse Act no longer apply. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 505-06, 106 S.Ct. 2039, 2043-2044, 90 L.Ed.2d 490 (1986) (Congressional act terminating federal services and statutory protections of Indians); *Larkin v. Paugh*, 276 U.S. 431, 433-34, 439, 48 S.Ct. 366, 366-367, 368, 72 L.Ed. 640 (1928) (with the issuance of fee simple patent under Burke Act of 1906, 34 Stat. 182, "title not only passed from the United States but the prior trust and the incidental restriction against alienation were terminated"). Moreover, the statutory authorization for the sale of Indian land following proper government approval makes no mention of reimposing restrictions should a tribe reacquire the land. See 25 U.S.C. §372 (1988 & Supp. II 1990). Rather, the broad statutory language suggests that, once sold, the land becomes forever alienable.

We hold that the parcels of land approved for alienation by the federal government and then reacquired by the Tribe did not then become inalienable by operation of the Nonintercourse Act. Because the parcels are alienable, they are also taxable.

AFFIRMED.

BEEZER, Circuit Judge, dissenting:

In *Oklahoma Tax Comm'n v. Sac & Fox Nation*, --- U.S. ----, ----, 113 S.Ct. 1985, 1993, 124 L.Ed.2d 30 (1993), Justice O'Connor, writing for a unanimous court, stated:

> Absent explicit congressional direction to the contrary, we presume against a State's having

> the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities.

While Sac & Fox Nation focused on income and motor vehicle taxes, its broad, strong language reiterates our duty to find explicit congressional permission whenever we allow state taxation. The opinion filed today concludes that *County of Yakima v. Yakima Indian Nation*, --- U.S. ----, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992) holds that if the Lummi land is alienable, it is taxable. I believe this analysis is incomplete.

As a threshold matter, certain canons of construction apply in the area of federal Indian law. The Supreme Court has stated:

> [A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians.... And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intentions to do so unmistakably clear.' *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985).

Yakima Indian Nation, --- U.S. at ----, 112 S.Ct. at 689 (emphasis added).

The crux of the analysis in the opinion filed today can be succinctly stated in three steps. First, a state cannot tax reservation lands unless Congress has made this intention unmistakably clear. Second, Yakima

Indian Nation found such clarity in the General Allotment Act ("GAA") sections on alienability. Third, *Yakima Indian Nation* holds that where Congress provides that Indian lands are alienable, Congress has made it clear that the land is taxable.

This legal interpretation misses the point. The land involved in this case is not GAA-patented land. We need to find the unmistakably clear intent of Congress to allow taxation on these particular lands, lands which do not come under the GAA. The Supreme Court in *Yakima Indian Nation* did not ignore how the land was allotted; the method of land allotment is crucial in federal Indian law. Accordingly, *Yakima Indian Nation* does not answer the crucial question in this case: Has Congress made it unmistakably clear that these lands may be taxed by the state?

There is an appealing simplicity to the proposition that alienable land is taxable land. Unfortunately, federal Indian law does not have a simple history; no amount of wishing will give it a simple future. *Yakima Indian Nation* is a case of statutory interpretation which presents a detailed analysis of the language and structure of the GAA as it applies to allotments and patents issued under its particular provisions. Through its analysis, the Supreme Court found Congress' unmistakably clear intent to permit state taxation of reservation fee lands allotted under the Act.

The same type of analysis must be applied to an allotment or assignment made under other statutory authority. We need to look to the Treaty of Point Elliott and 25 U.S.C. §372, the statutory authority underlying these patents, to decide this case. Because

that analysis has not been undertaken, I respectfully dissent.

ORDER
December 23, 1993

The opinion filed October 1, 1993, slip op. 11081, and appearing at 5 F.3d 1355 (9th Cir.1993), is amended as follows:

[Editor's Note: The amendments have been incorporated into published opinion.]

With these amendments, Judges Wright and Leavy have voted to deny the petition for rehearing. Judge Beezer would grant the rehearing petition. Judges Beezer and Leavy have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App.P. 35

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED.**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUMMI INDIAN TRIBE, Plaintiff-Appellant, v. WHATCOM COUNTY; BARBARA CORY, Defendants-Appellees.	No. 91-35622 D.C. No. CV-89-696-W **ORDER GRANTING MOTION TO REENTER JUDGMENT**

Before: WRIGHT, BEEZER and LEAVY, Circuit Judges.

The motion of the appellant filed on April 6, 1994 to reenter the judgment heretofore entered on December 23, 1993, there being no objection by opposing counsel, is **GRANTED.** The mandate will be recalled and the clerk will enter a new judgment.

Filed April 19, 1994

APPENDIX C

TREATIES AND STATUTES INVOLVED

ARTICLE 7. Treaty of Point Elliott, 12 Stat. 927 (1859):

ARTICLE 7. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations herein before made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE 6. Treaty With the Omahas, 10 Stat. 1043 (1854):

ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and until a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such

person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

§177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the

compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

§331. Allotments on reservations; irrigable and nonirrigable lands

In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest, not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: *Provided,* That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: *Provided further,* That where a treaty or Act of Congress setting apart such reservation provides for

allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act, subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified herein, with the consent of the Indians expressed in such manner as the President in his discretion may require.

§348. Patents to be held in trust; descent and partition

Upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after

patents therefor have been executed and delivered, except as herein otherwise provided: *And provided further,* That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided, however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further,* That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years' occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of

Indians; to whom such reservations belonged; and the same, with interest thereon at 3 per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the Bureau of Land Management, and afterwards delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization was occupying on February 8, 1887, any of the public lands to which this Act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this Act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this Act and become citizens of the United States shall be preferred.

Provided further, That whenever the Secretary of the Interior shall be satisfied that any of the Indians of the Siletz Indian Reservation, in the State of Oregon, fully capable of managing their own business affairs, and being of the age of twenty-one years or upward, shall, through inheritance or otherwise, become the owner of more than eighty acres of land upon said reservation, he shall cause patents to be issued to such Indian or Indians for all of such lands over and above the eighty acres thereof. Said patent or patents shall be issued for the

least valuable portions of said lands, and the same shall be discharged of any trust and free of all charge, incumbrance, or restriction whatsoever; and the Secretary of the Interior is authorized and directed to ascertain, as soon as shall be practicable, whether any of said Indians of the Siletz Reservation should receive patents conveying in fee lands to them under the provisions of this Act.

§349. Patents in fee to allottees

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided,* That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further,* That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further,* That the provisions of this Act shall not extend to any Indians in the former Indian Territory.

§372. Ascertainment of heirs of deceased allottees; settlement of estates; sale of lands; deposit of Indian moneys

When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: *Provided,* That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor. All sales of lands allotted to Indians authorized by this or any other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe, and he shall require a deposit of 10 per centum of the purchase price at the time of the sale. Should the purchaser fail to comply with the terms of sale prescribed by the Secretary of the Interior, the amount so paid shall be forfeited; in case the balance of the purchase price is to be paid on such deferred payments, all payments made, together with all interest paid on such deferred installments, shall be so forfeited for failure to comply with the terms of the sale. All

forfeitures shall inure to the benefit of the allottee or his heirs. Upon payment of the purchase price in full, the Secretary of the Interior shall cause to be issued to the purchaser patent in fee for such land: *Provided,* That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent as their respective interests shall appear: *Provided further,* That the Secretary of the Interior is authorized, in his discretion, to issue a certificate of competency, upon application therefor, to any Indian, or in case of his death to his heirs, to whom a patent in fee containing restrictions on alienation has been or may hereafter be issued, and such certificate shall have the effect of removing the restrictions on alienation contained in such patent: *Provided further,* That any United States Indian agent, superintendent, or other disbursing agent of the Indian Service may deposit Indian moneys, individual or tribal, coming into his hands as custodian, in such bank or banks as he may select: *Provided,* That the bank or banks so selected by him shall first execute to the said disbursing agent a bond, with approved surety, in such amount as will properly safeguard the funds to be deposited. Such bonds shall be subject to the approval of the Secretary of the Interior.